IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

SUPREME COURT NO. 92251-9

COMMON SENSE ALLIANCE, P.J. TAGGARES COMPANY, and FRIENDS OF THE SAN JUANS,

Appellants,

v.

GROWTH MANAGEMENT HEARINGS BOARD, WESTERN WASHINGTON REGION, and SAN JUAN COUNTY,

Respondents.

SAN JUAN COUNTY'S ANSWER TO FRIENDS OF THE SAN JUANS' PETITION FOR REVIEW

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I. INTRODUCTION

In this appeal under the Administrative Procedure Act, Chapter 34.05, the Petitioner Friends of the San Juans ("Friends") asks the Court to review findings of fact and legal conclusions presented by Friends for the first time on appeal. Essentially Friends is asking the Court to step into the shoes of the Growth Board and decide the issues anew based on the materials and argument offered now, rather than those presented to the Growth Board. Friends supports its position by arguing that because the Court of Appeals decision does not mention these issues (because they were not presented) the decision conflicts with established Washington State case law.

It was Friends' burden to present evidence to the Growth Board establishing noncompliance with the GMA. Friends failed to do so and cannot now distort the record and procedural history of this case in an effort to manufacture a case for appeal.

II. ISSUES PRESENTED FOR REVIEW

1. **Whether review is proper under RAP 13.4(b) when the Appellant failed to raise these arguments at the Growth Board, Superior Court or Court of Appeals?**

2. **Whether Friends met its burden under RCW 34.05.570(3) and established that the Growth Board erred in ruling that Friends failed to meet its burden of demonstrating the appealed ordinances do not comply with the GMA?**

III. FACTUAL BACKGROUND

San Juan County ("the County") used a three-step process to update its critical area regulations. First, the County identified the best available science ("BAS"). Second, the County received recommendations from scientists for revising existing regulations in consideration of the BAS. Last, the County considered and adopted regulations to designate and protect critical areas.

A single document known as the "BAS Synthesis" was written to summarize and describe the BAS that would be included in the County's review and revision of its critical areas regulations. The BAS Synthesis was based on a review of over 1,900 books, papers, and reports, including many provided by the public in response to the County's call for submittals. *See, e.g.,* AR 5472-73 (Publication of call for submittals). In early February 2011, the County Planning Commission and the County Council held two days of joint meetings to review a draft BAS Synthesis document. AR 5211-14. The Planning Commission and the Council invited questions and comments from the public and heard from scientists. *Id.* An additional workshop was held in May 2011 and public comments were solicited on an updated BAS Synthesis. AR 5215-16. On June 7, 2011, the County Council approved the BAS Synthesis document and adopted the supporting

scientific literature in Resolution 22-2011. AR 4854-57. This Resolution was not appealed.

Next, the Planning Commission and the County Council held meetings and received reports and recommendations from scientists on how existing regulations might be changed in consideration of the BAS. AR 5217-19. Six reports were issued, which set out existing regulations and explained proposed options based upon BAS in general terms. AR 5536-87, 5737-70, 5499-04, 5588-14, 5197-05, and 5189-96. These reports, comprised the "CA science review."

Having developed BAS and evaluated existing regulations in light of that BAS, the County was ready to prepare draft Critical Area Ordinances ("CA Ordinances") for public comment. The Planning Commission held hearings and provided recommended changes to these drafts. AR 5511-15, 5645-46, 5653-54, 5655-57, and 5270-71. Finally, the County Council held hearings and adopted the CA Ordinances. AR 5303-5373, 5381-5419, 5420-5457.

IV. ARGUMENT

This case comes to the Court after the superior court judge and a unanimous panel of the Court of Appeals Division I, upheld the Growth Board's findings that Friends failed to meet its burden of establishing noncompliance with the GMA.

Friends has not established good cause for the Court to continue review at this level. Considerations for acceptance of review by the Supreme Court are provided in Rule of Appellate Procedure 13.4(b). Friends advocates for acceptance of review under subsections (1), (2), and (4) arguing that the Court of Appeals decision conflicts with a decision of the Supreme Court and with decisions of the Court of Appeals and that the issues presented are of substantial public interest.

Each of Friends' arguments should be evaluated in the context of the burden of proof before the Growth Board. To meet that burden, the Growth Board needed to be left with a firm and definite conviction that the adoption of the challenged provisions was clearly erroneous. RCW 36.70A.320(3). As to each of the appealed issues, the Growth Board determined that Friends failed to meet this burden. Friends appealed arguing both erroneous interpretation or application of law and failure to rely on substantial evidence. CP 398-99. Both the Superior Court and the Court of Appeals upheld the Growth Board's decision finding that Friends failed to show that the Growth Board erred, either legally or by failing to rely on substantial evidence. Court of Appeals decision, pg. 29.

Appellate courts review the Growth Board's decision applying the standards of the Administrative Procedure Act directly to the record before the agency sitting in the same position as the superior court. *King County*

v. CPSGMHB, 142 Wn.2d 543, 553, 14 P.3d 133 (2000). Thus, in this case the Court looks to the record before the Growth Board to evaluate the Growth Board's determination that Friends failed to meet its burden of establishing noncompliance with the GMA.

A. The Court of Appeals Decision Does Not Conflict with Decisions of This Court or the Court of Appeals.

Friends has "cherry picked" quotes from each case they relied upon, however, when these quotes are read in context it is clear that these cases are not applicable to the facts here. No conflict exists with Washington case law.

1. *Ferry County v. Concerned Friends of Ferry County*, small wetland exclusion and limited vegetation removal.

Friends states the Court of Appeals decision conflicts with *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 123 P.3d 102 (2005) "by not requiring analysis of valid scientific information." Petition for Review, pg. 12-13. Friends supports this contention by stating that the County failed to follow the recommendations from the Department of Ecology. *Id.*

In that case the question before the Court was whether substantial evidence supported the assertion that BAS was used by Ferry County in developing its regulations. *Id.* at 836. The Court stated, "[t]he information relied on by the county does not rise to the level of scientific information

and, therefore cannot possibly qualify as BAS." *Id.* The Court goes on to say, "[f]urthermore, the steps taken in analyzing the information do not constitute a reasoned process." *Id.* at 837.

This is distinctly different from the facts of this case, where the Growth Board dedicated a section of its decision to analysis and examination of the BAS used by San Juan County. AR 6288-6292. The issues presented to the Growth Board by Friends was whether the CA Ordinances were consistent with the BAS, not the adequacy of the BAS. The adequacy of the County's BAS was not raised by Friends and was not considered or ruled upon by the Growth Board, Superior Court or Court of Appeals. The Growth Board noted that "Friends' argument highlights the difficulty of citing Board or appellate court decisions in regard to BAS and the BAS record. The BAS in any particular decision may not be similar to BAS relied on by a different jurisdiction and reflected in the decision challenging that decision." AR 6316-17.

The Growth Board, the Superior Court and the Court of Appeals recognized that the County included and relied upon BAS in its CA Ordinances. As to the exclusion of wetlands under 1,000 square feet, the Court of Appeals stated "[t]he County's synthesis of best available science explicitly contemplates the exclusion of small wetlands from regulation – one subsection is named 'Establishing Minimum Wetland Size for

Regulation.'" COA decision, pg. 23. As to limited vegetation removal the Growth Board found it was Friends, not the County, that failed to come forward with scientific information to meet its burden. AR 6323. The Growth Board, Superior Court and Court of Appeals again recognized, "the County relied on best available science suggesting that many wetland animals benefit from minor pruning because it leads to more sunshine and warmer temperatures." COA decision, pg. 27.

2. *Swinomish Tribal Community v. WWGMHB* and departure from BAS

Friends next states the Court of Appeals decision conflicts with the holding in *Swinomish Tribal Community v. WWGMHB*, 161 Wn.2d 415, P.3d 1198 (2008) that a county must provide reasoned justification for departing from BAS. Petition for Review, pg. 13. Yet, as Friends later acknowledges[1], that is not the holding in *Swinomish*. The holding in *Swinomish* is that the GMA requires "protection" but not "enhancement" of critical areas. 161 Wn.2d at 429-430. The statement relied on by Friends, when taken in context provides expressly for departure from BAS when a reasoned justification is provided:

> Under the GMA, counties and cities 'have broad discretion in developing ... [development regulations] tailored to local circumstances.' Moreover, the GMA does not require the

[1] "The Court held that Skagit County justified its departure because the imposition of mandatory buffers would have exceeded the GMA requirement to protect critical areas, and thus was not legally required." Petition for Review, pg. 13.

> county to follow BAS; rather, it is required to 'include' BAS in its record. RCW 36.70A.172(1). Thus, the county may depart from BAS if it provides a reasoned justification for such departure.

Id. at 430-431 (internal citations omitted).

Indeed, the County did provide a detailed, written reasoned justification for allowing orchards and gardens in buffers (AR 5389) consistent with the decision in *Swinomish.*

3. *Ferry County v. GMHB* and departure from BAS

Similarly, in this case, unlike in *Ferry County v. GMHB*, 184 Wn. App. 685, 339 P.3d 478 (2014), the County used a thorough and reasoned process to evaluate and adopt its BAS. *See* AR 4854-57. The County's BAS Synthesis was adopted in 2011. AR 4854-57. Friends did not appeal the adoption of the BAS Synthesis.

In *Ferry County*, the county did not even use or rely on BAS in developing its critical area regulations. The *Ferry County* court stated,

> A county should produce valid scientific information and consider competing scientific information and other factors through analysis constituting a reasoned process. Ferry County need not develop the scientific information through its own means, but 'because it chose to disagree with or ignore scientific recommendations and resources provided by the state agencies and the Colville Tribes, **which it could do**, the county necessarily had to unilaterally develop and obtain valid scientific information.'

Id. at 701 (internal citations omitted; emphasis added).

The facts in *Ferry County* are very different from this case where, as the Growth Board stated,

> the County clearly addressed the available sources of BAS included in its decision-making process as required by WAC 365-195-915(1). Early on, a document referred to as the *BAS Synthesis* was adopted in June 2011. The syntheses were developed subsequent to a review of nearly 2000 books, papers and reports, including many provided to the County in response to the County's request for submittals of science.

AR 6339-40 (internal citations omitted). A county may depart from BAS if it provides a reasoned justification for such departure. *Ferry County*, 184 Wn. App. at 502; *Swinomish*, 161 Wn.2d at 431-432.

The Growth Board found San Juan County included BAS in its record and provided reasoned justifications for departure in exempting wetlands under 1,000 square feet and in allowing orchards and gardens in buffers under limited circumstances. AR 6315 and 6322. The Petition for Review fails to demonstrate how these findings or the holding of the Court of Appeals decision conflict with these well-established principles.

4. *King County v. CPSGMHB* and buffer reduction

Friends' argument asserting the Court of Appeals decision conflicts with *King County v. CPSGMHB*, 142 Wn.2d 543, 14 P.3d 133 (2000) is even more tenuous. This argument is based on the false and unsupported assertion that the CA Ordinances elevate "views above the required protection of [critical areas]." Petition for Review, pg. 17. The flaw in this

argument is that no evidence in the record before the Growth Board showed that the "goal of private views" was elevated above the requirements of the GMA to protect critical areas. Indeed the Growth Board found that the CA Ordinances authorize buffer reduction "if and only if the proposed development 'will result in no net loss of shoreline ecological function' or in the event of view blockage by nearby development, adverse impacts are identified, minimized and mitigated." AR 3610. Friends has failed to establish any error in the Growth Board's decision or any inconsistency with established case law.

5. Jefferson County v. Seattle Yacht Club and nonconforming uses

Finally, Friends' assertion regarding alleged conflict with *Jefferson County v. Seattle Yacht Club*, 73 Wn. App. 576, 870 P.2d 987 (1994) should be disregarded. That case involves a shoreline substantial development permit and the requirements of the Jefferson County Shoreline Master Program. *Id.* The quote relied on by Friends regarding nonconforming uses is contained in a section evaluating a requirement of the Jefferson County SMP that proposals be compatible with surrounding uses. *Id.* at 590. The leap that is required to relate this statement to San Juan County's CA Ordinances is unsupportable. Friends makes a conclusory reference to the County's "reliance on nonconforming setbacks to authorize new

development near shorelines" without any citation to the record or further explanation. This is not sufficient to enable a response.

It is worth reminding the Court that this argument, as with many other arguments, was not presented to the Growth Board, the Superior Court or the Court of Appeals but is proposed here for the first time. This approach does not meet Friends' burden and does not meet the Court's standards for accepting issues for review.

B. This Case Does Not Present Issues of Substantial Public Interest.

Friends asserts the Court should accept review because there is a "lack of well-defined standards for a reasoned justification for departure from BAS." Petition for Review, pg. 20. Friends does not quarrel with the fact that the County may depart from BAS with a reasoned justification, only with the level of detail. A court-defined standard of a "reasoned justification" is not necessary. All that is needed is review of the justification, which has been done.

The Legislature enacted the requirement that "counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas." RCW 36.70A.172. The Legislature further granted the Department of Community, Trade and Economic Development ("the department") authority to adopt rules to assist counties and cities to comply with the goals

and requirements of the GMA. RCW 36.70A.190. The department did so in Chapter 365-195 WAC. The Courts have ample explanation of departure from BAS. Any further standards should come from the Legislature.

V. CONCLUSION

For all of the above reasons, San Juan County respectfully asks this Court to deny discretionary review.

Respectfully submitted this 8th day of October 2015.

RANDALL K. GAYLORD
PROSECUTING ATTORNEY

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IN THE SUPREME COURT
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COMMON SENSE ALLIANCE, P.J. TAGGARES COMPANY, and FRIENDS OF THE SAN JUANS, Appellants, v. GROWTH MANAGEMENT HEARINGS BOARD, WESTERN WASHINGTON REGION, and SAN JUAN COUNTY, Respondents.	NO. 92251-9 CERTIFICATE OF SERVICE

Elizabeth Halsey declares and states:

That I am now, and at all times hereinafter mentioned was, a citizen of the United States and a resident of San Juan County, state of Washington, over the age of 18 years, competent to be a witness in the above-entitled proceeding and not a party thereto; that on October 8, 2015, I caused to be delivered in the manner indicated below a true and correct copy of SAN JUAN COUNTY'S ANSWER TO FRIENDS OF THE SAN JUANS' PETITION FOR REVIEW in the above-entitled cause to:

Kyle A. Loring Attorney for Appellant Friends of the San Juans PO Box 1344 Friday Harbor, WA 98250-1344	By Regular Mail Via Email: kyle@sanjuans.org
Brian T. Hodges Attorney for Appellants CSA and P.J. Taggares Company Pacific Legal Foundation 10940 NE 33rd Pl, Suite 210 Bellevue, WA 98004	By Regular Mail Via Email: bth@pacificlegal.org
Dionne Padilla-Huddleston Office of the Attorney General	Via Email: dionnep@atg.wa.gov

I make the foregoing statement under penalty of perjury of the laws of the state of Washington.

Dated this 8th day of October, 2015, at Friday Harbor, Washington.

Elizabeth Halsey

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OFFICE RECEPTIONIST, CLERK

To: Elizabeth Halsey
Cc: 'kyle@sanjuans.org'; 'bth@pacificlegal.org'; dionnep@atg.wa.gov; Amy Vira
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Cc: 'kyle@sanjuans.org' <kyle@sanjuans.org>; 'bth@pacificlegal.org' <bth@pacificlegal.org>; dionnep@atg.wa.gov; Amy Vira <amyv@sanjuanco.com>
Subject: E-filing in Case No. 92251-9 by San Juan County

Hello,

Please accept Electronic filing of San Juan County's Answer to Friends of the San Juans' Petition for Review in *CSA et al. v. GMHB et al.,* Case No. 92251-9 for Amy S. Vira, WSBA #34197, (360) 378-4101, amyv@sanjuanco.com.

Thank you,

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